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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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CASE NO. _____

STATE OF FLORIDA,

Petitioner,

-vs-

WILLIE CLAYTON SIMPSON,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600

## QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONCLUDED THAT THE RIGHT AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS APPLIED TO A DEFENDANT WHO WAS CROSS-EXAMINED AT TRIAL ABOUT HIS SILENCE AT A PRIOR PRELIMINARY HEARING FOR ANOTHER INDIVIDUAL AT A TIME WHEN THE DEFENDANT HAD NOT BEEN ARRESTED, HAD NOT RECEIVED MIRANDA WARNINGS, AND WAS NOT EVEN A SUSPECT?

II.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY REFUSED TO APPLY THE HARMLESS ERROR DOCTRINE TO DETERMINE WHETHER ALLEGEDLY IMPROPER COMMENTS AND TESTIMONY ABOUT A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT CONSTITUTED REVERSIBLE ERROR?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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NO.

STATE OF FLORIDA,

Petitioner,

-vs-

WILLIE CLAYTON SIMPSON,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

## OPINIONS BELOW

The official opinion of the Supreme Court of Florida has not yet been reported.

## JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Florida was entered on April 8, 1982, and the State's Motion for Rehearing was denied on September 15, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) because the Florida Supreme Court has decided a substantial federal question in a manner contrary to applicable decisions of this Court as well as several federal courts of appeals. The opinion upon which review is sought is final even though a retrial has been ordered because should Respondent be acquitted, under Florida law, the State would be unable to appeal. See Miranda v. Arizona, 384 U.S. 436, 498, n. 71 (1966), where the Court explained that it had jurisdiction in the companion case of California v. Stewart for this reason.

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the Federal Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The Fourteenth Amendment to the Federal Constitution provides in pertinent part that no state:

> . . . shall deprive any person of life, liberty, or property, without due process of law.

Florida Rule Criminal Procedure 3.140(a)(1) provides:

> (a) METHODS OF PROSECUTION.
>
> (1) CAPITAL CRIMES. An offense which may be punished by death shall be prosecuted by indictment.

Florida Rule Criminal Procedure 3.131(b)(1) provides:

> (b) ADVERSARY PRELIMINARY HEARING.
>
> (1) WHEN APPLICABLE. A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

Section 924:33, Fla. Stat. provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

## STATEMENT OF THE CASE

### A.

### HISTORY OF THE CASE

Willie Clayton Simpson was indicted for the August 10, 1974, murder of police officer John Kennedy. After a trial by jury, he was found guilty as charged on March 10, 1976, and on May 17, 1976, was capitally sentenced after the jury recommended a sentence of death.

Respondent Simpson filed a direct appeal raising numerous issues in the Supreme Court of Florida. In a written opinion rendered on April 8, 1982, the Supreme Court of Florida reversed Respondent's conviction and ordered that a new trial be held. The State of Florida moved for rehearing and urged that the court had misinterpreted the facts of Respondent's case and also that the Florida

Supreme Court had erroneously refused to consider the harmless error doctrine as it applied to the particular facts and circumstances of Respondent's case. On September 15, 1982, rehearing was denied, however, the court did issue a revised opinion (A-1).

B.

## STATEMENT OF THE FACTS

Respondent was arrested and given an initial appearance on December 16, 1974, for a homicide which was unrelated to this case. While he was incarcerated awaiting trial for that murder, he formulated a plan by which he could obtain immunity for the first murder. He contacted representatives of the Palm Beach County Sheriff's Department and offered to provide information about the murder of Officer Kennedy in exchange for immunity for the

charges under which he was then incarcerated.

Respondent falsely accused an individual named Jimmy Lee Harold, and he agreed to testify against Harold at Harold's preliminary hearing.[1] At Jimmy Lee Harold's preliminary hearing, Respondent refused to testify because the State refused to grant him immunity for the murder charges under which Respondent at that time was incarcerated. As a result of Respondent's refusal to testify, the trial court was unable to find probable cause to hold Jimmy Lee Harold, and charges against him were dismissed. This shifted the

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[1] Under Florida law, a defendant charged with a capital crime must be indicted by a grand jury. Florida Rule Criminal Procedure 3.140(a)(1). If a capitally charged defendant has not been indicted within twenty-one days of his arrest, the State is required to afford the defendant an adversary preliminary hearing.

investigation to Respondent who was subsequently arrested nine months later for the murder of Officer Kennedy.

After Respondent had been convicted and sentenced, he filed a direct appeal in the Supreme Court of Florida in which he undoubtedly misstated he had exercised his fifth amendment right to remain silent at a grand jury proceeding investigating the murder of the police officer. See Brief of Appellant filed in the Supreme Court of Florida at pp. 13-16. Respondent specifically argued that he "clearly had the right to remain silent before the grand jury as no immunity had been extended..." (Brief of Appellant in the Florida Supreme Court at 14). He cited Doyle v. Ohio, 426 U.S. 610 (1976), and he argued that since the error was of constitutional dimensions, "the harmless error rule was

not applicable." (Brief of Appellant in the Florida Supreme Court at 15.)

The Supreme Court of Florida then reversed Respondent's conviction and accepted Respondent's argument in full without regard to the harmless error doctrine:

> Appellant raises numerous issues on appeal, however, we find one to be dispositive of the entire matter. Appellant argues that it was harmful error for the prosecutor to elicit from him during cross-examination, testimony concerning his failure to testify before the grand jury investigating this crime, and that the prosecutor's reference during closing argument to such failure to testify was equally harmful.
>
> We agree.

Simpson v. State, ___So.2d___, Case No. 49,681 (Fla., opinion filed Sept. 15, 1982).

On rehearing, the State of Florida vigorously urged that Respondent had never been called to testify at any grand jury

investigating any crime and that the allegedly improper comments had referred to Respondent's silence at another defendant's preliminary hearing at a time when Respondent had not been arrested, had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted. The State of Florida relied extensively on Jenkins v. Anderson, 447 U.S. 231 (1980), to support its argument that the United States Constitution did not forbid comment about prearrest silence at a time when the "insoluble ambiguity" condemned by Doyle v. Ohio, supra, could not possibly exist.

It is critical that this Court recognize the true facts of this case in that Respondent remained silent at a preliminary hearing for someone else rather than at the grand jury which indicted Respondent. In that regard, this Court

does not have to accept the Florida Supreme Court's erroneous characterization of the facts. See Whitus v. Georgia, 385 U.S. 545 (1967), in which this Court recognized that although a state court's factual conclusions were entitled to great respect, this Court had a duty to make an independent inquiry in order to determine the facts which were disputed by the parties. See also Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which the Court explained that its usual deference to a state court's factual conclusion was predicated upon a belief that the State fact finder had made a conscious determination of the existence or non-existence of a critical fact. It should be noted that in Respondent's Response to Motion for Rehearing, it was never disputed that Respondent had misstated the facts in his initial brief, but instead Respondent

argued that he "drew reasonable inferences and commented on the legal implications of those comments." (Response to Motion for Rehearing at 1.)

In order that the Court be able to determine the correct facts of this case, the State of Florida has requested the Supreme Court of Florida to forward selected portions of the record on appeal to this Court pursuant to Rule 19.1. Support for the State's position can be found in the affidavits of Harold's defense counsel and the court reporter which were appended to the State's Motion for Rehearing. Both of these individuals were present at Harold's preliminary hearing. Also, it is apparent from the portion of the trial colloquy quoted by the Florida Supreme Court that the prosecutor was referring to Harold's preliminary hearing

rather than a grand jury which indicted Respondent (A-8,9).

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I.

**THE FLORIDA SUPREME COURT IGNORED THIS COURT'S CONTROLLING PRECEDENT IN JENKINS V. ANDERSON, 447 U.S. 231 (1980), WHEN IT HELD THAT THE UNITED STATES CONSITUTION PREVENTED THE PROSECUTION FROM IMPEACHING A DEFENDANT'S CREDIBILITY BY CROSS-EXAMINING HIM ABOUT HIS PREARREST SILENCE.**

In Jenkins v. Anderson, 447 U.S. 231, 241 (1980), this Court held that the use of a defendant's prearrest silence to impeach his credibility does not violate the Constitution. In reaching this conclusion, the Court relied upon its prior opinion in Raffel v. United States, 271 U.S. 474 (1926), which "clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent." Jenkins v. Anderson, supra,

at 447 U.S. 236, n.2. See also Johnson v. United States, 318 U.S. 189, 196 (1943), in which the Court stated that it would not have been error for a trial court to disallow a defendant from using the Fifth Amendment to shield himself from certain questions during cross-examination, thus allowing adverse inferences to be made from the fact that the defendant failed to testify.

In spite of these cases, the Florida Supreme Court extended its previous opinions which had concluded that Miranda v. Arizona, 384 U.S. 436 (1966) and Doyle v. Ohio, 426 U.S. 610 (1976), required a finding of reversible error in all cases in which the prosecution has referred to a defendant's silence. The Florida Supreme Court has now held that

reversible error occurs regardless of whether the silence occurred at a time when the defendant had not been arrested, had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted. In Respondent Simpson's case, the lower court explained that its position "with respect to the Fifth Amendment right to silence is quite clear."[2] Simpson,

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[2] The Florida Supreme Court has inexplicably refused to recognize that Doyle was decided upon due process grounds because it was unfair for a state to rely at trial on the insoluble ambiguity created by the affirmative assurances of the Miranda warnings. Thus, the court is unable to determine whether a violation of due process has occurred depending on when and under what circumstances a defendant has remained silent. Instead, the Florida Supreme Court has misconstrued Doyle to mean that per se reversible error occurs whenever a defendant's right to silence is brought out at trial; the court has chosen not even to discuss whether the defendant was or should have been Mirandized.

supra, slip opinion on rehearing at 2. The court quoted from Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), which had directly quoted from Miranda v. Arizona for the proposition that the prosecution could not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation. The lower court then explained that it had used Jones (and Miranda) in Bennett v. State, 366 So.2d 41 (Fla. 1975), which had correctly found that it was reversible error for the State to elicit testimony that a defendant had refused to sign a waiver of his Miranda rights. The court quoted from Willinsky v. State, 360 So.2d 760 (Fla. 1978), which had extended Bennett to hold that cross-examination of a defendant about his silence at a

preliminary hearing was a denial of due process in light of Doyle v. Ohio, supra and United States v. Hale, 422 U.S. 171 (1975). The lower court in Willinsky concluded that the essence of this Court's holdings reflected a general policy that the disclosure of the exercise of the right to remain silent was a denial of due process "at any stage where the right to silence is protected." Willinsky, supra, at 360 So.2d 762.

Therefore, it is clear that the Florida Supreme Court has refused to acknowledge this Court's decision in Jenkins v. Anderson, supra, which clearly holds contrary to the results reached in Respondent's case. In other words, the Florida Supreme Court has refused to make a distinction between cases which involve silence

after Miranda warnings have been given as opposed to cases which involve silence prior to the giving of Miranda warnings. As this Court has previously explained, the reason for the distinction is that the giving of the Miranda warnings creates an "insoluble ambiguity" from which it is not possible to determine later why the defendant had remained silent -- was it because he was guilty or was it because he was relying upon the Miranda warnings? See Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490 (1982), which is this Court's most recent pronouncement of the reason why there is a distinction between its post-Doyle cases which involved prearrest silence and cases involving post-arrest silence like Doyle. Compare Roberts v. United States, 445

U.S. 522, 561 (1980), in which the Court observed that the post-conviction, presentencing silence of a defendant did not resemble post-arrest silence which might have been induced solely by the assurances contained in the Miranda warnings.

In Fletcher this Court emphasized that the use of silence for impeachment was fundamentally unfair in Doyle only because the Government might have induced the silence by the giving of Miranda warnings. In Respondent's case, unlike the situation in Doyle, the defendant was impeached with his silence which had occurred at someone else's preliminary hearing. It is significant to note that this preliminary hearing occurred only because Respondent had falsely accused another defendant of

committing the crime for which Respondent was ultimately convicted. When Respondent learned that he was not going to receive immunity for the crime for which he was incarcerated at that time (a charge unrelated to the conviction in this case), he refused to testify at the second defendant's preliminary hearing.

This is clearly not a case in which a defendant could say that his silence might have been induced by the "affirmative assurances" stemming from the Miranda warnings. Indeed, Respondent Simpson was not even arrested until nine months after he failed to testify at the second defendant's preliminary hearing.

The State of Florida fully recognizes that there is nothing in the United States Constitution which

would prevent the states from enacting constitutional or evidentiary provisions which would bar the use of a defendant's prearrest silence for impeachment purposes. Jenkins v. Anderson, at 447 U.S. 240; Fletcher v. Weir, supra. However this is not such a case -- Florida's appellate courts have held that Florida's Due Process Clause found in Article I, Section 9 of the Florida Constitution, affords the same protection as the Fifth Amendment to the United States Constitution. State v. Tsavaris, 382 So.2d 56, 68 (Fla. 2d DCA 1980), affirmed, 394 So.2d 418 (Fla. 1981). Moreover, it is readily apparent from the face of the Florida Supreme Court's opinion in Respondent's case that its position "with respect to the Fifth Amendment right to silence is

quite clear." Simpson, slip opinion at 1, 2. The Court relied upon Miranda, supra and Doyle v. Ohio, supra, and there was no mention of the Florida Constitution or of any Florida evidentiary rule which would prevent the State from impeaching a defendant with his prearrest silence.[3]

This Court should not countenance the Florida Supreme Court's extension

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[3] Should Respondent attempt to argue that Florida has placed greater restrictions on the use of a defendant's silence than the restrictions embodied in the United States Constitution, thus asserting a jurisdictional bar of state law, that argument would be refuted by Oregon v. Hass, 420 U.S. 714, 719 (1975). In that case, Justice Blackmun reiterated that "a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." Moreover, in Respondent's case, as in Oregon v. Hass, the decision was based upon the Fifth and Fourteenth Amendments, and no mention was made of the state constitution.

of Miranda and Doyle to situations in which this Court has already clearly stated that the Due Process Clause of the United States Constitution has not been violated, i.e., situations involving prearrest silence at a time when the silence could not possibly have been induced by the affirmative assurances of the Miranda warnings. The Florida Supreme Court has misconstrued this Court's holding in Doyle and ignored this Court's opinion in Jenkins v. Anderson, even though that case was cited extensively in the State's Motion for Rehearing. The Court also ignored Fletcher v. Weir, supra, which was provided as supplemental authority after the State's Motion for Rehearing was filed.

The State of Florida submits that this Court should grant certiorari and vacate the opinion of the Florida Supreme Court, and direct that that court reconsider its opinion in light of Jenkins v. Anderson, Raffel v. United States, and Fletcher v. Weir.

## II.

## THE FLORIDA SUPREME COURT REFUSED TO CONSIDER WHETHER TO APPLY THE HARMLESS ERROR DOCTRINE IN RESPONDENT SIMPSON'S CASE.

In Chapman v. California, 386 U.S. 18, 22 (1967), the Court categorically refused to adopt a rule that would make all federal constitutional errors, regardless of the facts and circumstances, per se reversible error. Yet, the Florida Supreme Court has refused to evaluate the facts and circumstances of Respondent's case to determine whether the constitutional error it erroneously found existed could be deemed harmless beyond a

reasonable doubt as was discussed in Chapman.[4] In accord, Doyle v. Ohio, at 426 U.S. 620.

In Respondent Simpson's case, the Supreme Court of Florida relied upon its prior decision in Bennett v. State, supra, which, in turn, had relied upon Jones v. State, supra, that had held that "any comment upon the defendant's standing mute, or refusing to testify, in the face of an accusation was fundamental error requiring a new trial." Bennett, supra, at 316 So.2d 42. The Supreme Court of Florida then concluded that the error "was of constitutional dimension and warrants reversal

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[4] Florida's harmless error doctrine has been codified in §924.33, Fla. Stat., which has been reproduced in its entirety in the constitutional and statutory provisions section of this brief.

without consideration of the doctrine of harmless error." Id. at 316 So.2d 44. Several years later, in Willinsky, supra, the Court relied upon Bennett when it held "that the harmless error rule is not applicable to disclosure of the accused's silence at a preliminary hearing. Willinsky, supra at 360 So.2d 763. Finally, as recently as July, 1982, the Florida Supreme Court wrote that "[a]ny comment on an accused's exercise of his right to remain silent is reversible error, without regard for the harmless error doctrine." Donovan v. State, 417 So.2d 674, 675 (Fla. 1982).

Therefore, in spite of the fact that this Court has never held that reference to a defendant's prearrest silence is reversible error regardless

of all the facts and circumstances, the Supreme Court of Florida has adopted such a rule. The Florida Supreme Court has in effect handcuffed the lower state appellate courts by the principle of stare decisis even though the lower courts have recognized the incorrectness of the prophylatic rule. See, e.g., Marshall v. State, 393 So.2d 584, 586 (Fla. 1st DCA 1981). In the State's Motion for Rehearing in Respondent's case, the Florida Supreme Court was requested to recede from its "prophylactic rule" and follow the decisions of the federal courts which have recognized that not all comments about a defendant's silence are reversible error without regard to the harmless error doctrine. See e.g., Stone v. Estelle, 556 F.2d 1242 (5th Cir.

1977); Meeks v. Havener, 545 F.2d 9 (6th Cir. 1976); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980). Moreover, even in Doyle v. Ohio itself, the Court recognized that harmless error had not been argued, thus implying that the harmless error doctrine could be applied on a case to case basis depending on the facts and circumstances of each case.

Finally, this Court has recently granted certiorari to consider this issue of whether an appellate court can refuse to consider the propriety of the harmless error doctrine in cases not involving fundamental error. In United States v. Hastings, 660 F.2d 301 (7th Cir. 1981), cert. granted, ___U.S.___, Case No. 81-1463, 32 Cr.L. 4027 (Oct. 6, 1982), the Seventh Circuit, like the Florida

Supreme Court, refused to apply the harmless error doctrine even though there was clear evidence of guilt. The question presented in that case is whether the lower court's refusal to apply the harmless error doctrine was correct.

Accordingly, should the Court decide not to grant certiorari to vacate the lower court's opinion in light of Jenkins v. Anderson, supra, the Court should grant certiorari and hold this case pending resolution of the identical issue presented in United States v. Hastings. See Keney v. New York, 388 U.S. 440 (1967), which provides support for retention of a case while certiorari is pending in a similar case.

## CONCLUSION

The Supreme Court of Florida has misconstrued Doyle v. Ohio and made it applicable to cases involving prearrest silence despite this Court's clear pronouncements to the contrary in Jenkins v. Anderson, Fletcher v. Weir, and Raffel v. United States. In Florida, unlike the rest of the country, the prosecution is prevented from impeaching a defendant's credibility by use of the defendant's prior silence even when the silence occurred prior to arrest, prior to the giving of the Miranda warnings, and prior to the defendant's even becoming a suspect. The Court should not countenance the Florida Supreme Court's continued disregard of or inability to understand this Court's controlling precedent. Hutto v. Davis, U.S.___, 70 L.Ed.2d 556 (1982).

Petitioner respectfully submits that this case is appropriate for summary disposition and that the Court should grant certiorari and vacate the opinion of the lower court for reconsideration in light of Jenkins v. Anderson and Fletcher v. Weir. In the alternative, the Court should grant certiorari and hold the case pending disposition of the identical harmless error issue in United States v. Hastings, Case No. 81-1463.

Respectfully submitted:

JIM SMITH
Attorney General

By: Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR PETITIONER

SUPREME COURT OF FLORIDA

Wednesday, September 15, 1982

| | | |
|---|---|---|
| WILLIE CLAYTON SIMPSON, | * | |
| Appellant, | * | |
| -vs- | * | CASE NO. 49,681 |
| STATE OF FLORIDA, | * | Circuit Court Case Nos. 76-386 CF |
| Appellee. | * | (Duval) and 75-2553 CF (Palm Beach) |
| | * | |

The opinion filed April 8, 1982, has been revised on page five (5), second paragraph as follows:

> In the present case, the defendant's timely objections to the improper comments were overruled. For the reasons stated above, it was not necessary that he also move for mistrial. His objections were preserved, and since the improper comments constitute reversible error, he is entitled to a new trial.

The motion for Rehearing having been considered in light of the revised opinion, is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and MCDONALD, JJ., Concur

A True Copy JB

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. S. Morgan Slaughter, Clerk
Hon. Clifford B. Shepard, Chief Judge
Craig S. Barnard, Esquire
Jerry L. Schwartz, Esquire
Miquel A. Olivella, Esquire

SUPREME COURT OF FLORIDA

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NO. 49,681

---

WILLIE CLAYTON SIMPSON, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 8, 1982]

ADKINS, J.

We have before us a direct appeal from a judgment imposing the death sentence upon

Willie Clayton Simpson. Jurisdiction is pursuant to article V, section 3(b)(1), Florida Constitution.

The facts are that officer John Kennedy of the Delray Beach Police Department was shot to death during the early morning hours of August 10, 1974. Appellant was indicted for the murder of officer Kennedy and was found guilty by a jury of first-degree murder on March 10, 1976. The jury subsequently returned an advisory sentence of death. On May 17, 1976, appellant was adjudicated guilty and sentenced to death.

Appellant raises numerous issues on appeal, however, we find one to be dispositive of the entire matter. Appellant argues that it was harmful error for the prosecutor to elicit from him during cross-examination, testimony concerning his failure to testify before the grand jury investigating this crime,

and that the prosecutor's reference during closing argument to such failure to testify was equally harmful.

We agree. The position of this Court with respect to the Fifth Amendment right to silence is quite clear. In the case of Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), the district court quoted from Miranda v. Arizona, 384 U.S. 436 (1966), as follows:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." [Emphasis supplied.]
>
> "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self incrimination protects the individual from being compelled to incriminate himself in any manner;

it does not distinguish degrees of incrimination."

200 So.2d at 576.

We cited Jones in Bennett v. State, 316 So.2d 41 (Fla. 1975), and used it as the basis for our decision. In Bennett, the defendant moved for a mistrial because a state witness told the jury that defendant refused to sign a waiver of his Miranda rights. The trial court denied the motion and instructed the jury to disregard the improper testimony. We held this to be reversible error for the reasons discussed in Jones.

In Willinsky v. State, 360 So.2d 760 (Fla. 1978), defendant was on t ial for the unlawful possession and sale of cocaine. During cross-examination of the defendant the prosecutor made what was an obvious comment on defendant's failure to testify

at a preliminary hearing. We said in Willinsky that:

> Impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process. It should not be material at what stage the accused was silent so long as the right to silence is protected at that stage. The language in Doyle v. Ohio, 425 U.S. 610, 95 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), although set in the context of silence at arrest, reflects a general policy. The essence of these holdings is that impeachment by disclosure of the exercise of the right to silence is a denial of due process. The general terms used by the Supreme Court of the United States are not limited to arrest, but apply at any stage where the right to silence is protected.

360 So.2d at 762.

Appellee argues that the issue of the prosecutor's improper comments on defendant's right to remain silent is waived because it was not properly preserved for appellate review. Two bases

are given for this argument: 1) Clark v. State, 363 So.2d 331 (Fla. 1978), holds that as a matter of law, without a motion for mistrial, appellate review of the instant issue is waived; and 2) appellant did not litigate the precise ground argued herein in support of his objection.

As to the first basis, Justice Alderman made very clear in Clark that we were considering the effect of the defendant's failure to object. This issue was not decided in Bennett or Willinsky, where timely objection had been made to the improper comments. There is no question in the instant case about whether there was a timely objection. The trial record discloses the following exchange:

> BY MR. HARPER:
> Q. And when Jimmy Lee Harold came to court, did you testify in that case?
>
> A. No.

MR. STARR: Now we object to this. It's immaterial, irrelevant and - -

THE COURT: Overruled.

BY MR. HARPER:
Q. Did you refuse to testify in that case?

A. Yes, I did.

Q. Did you refuse because you wanted immunity?

MR. STARR: We object to this.

* * * *

MR. HARPER: Jimmy Lee Harold was arrested, and he was taken to court, and you heard that testimony. And when this man was called as a witness, he said, "I will not testify against him unless you give me immunity in this case."

MR. STARR: I object to that part of the argument. It's not part of the case. There's no such testimony in this record that this defendant begged for immunity - - asked for immunity. He said he took the Fifth Amendment, which he has every right in the world under the Constitution of both the State and the United States to do. But there was nothing in the record of any immunity that he asked for, and we ask the Court to instruct the jury not to consider that in this argument.

THE COURT: The motion is denied. Proceed. Under these circumstances, where clearly a timely objection to the improper comment was made by defense counsel, and where the judge unequivocally and without hesitation overruled the objections, the issue of the admission of such testimony and comments before the jury is properly preserved for appeal. It is evident that a motion for mistrial at either juncture in the trial where defense counsel's objections were overruled would have been futile. To require such a motion would be to place form above substance and would seriously hinder the administration of justice. We should seek to avoid, not foster a hypertechnical application of the law.

Clark held that a contemporaneous objection is necessary. The rule is clear that if the defendant at the time the improper comment is made fails to object,

his right to object is waived and he may not raise that issue on appeal.

The secondary issue in Clark was what happens if there is a contemporaneous objection and the trial court finds that there has been an improper comment and sustains the defendant's objection. In that event, the rule is also clear. The defendant must move for mistrial if he wishes to preserve his objection, and he will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed.

But what happens, as in the present case, where the defendant's contemporaneous objection is overruled by the trial judge? In Clark we said:

> When an objection and motion for mistrial are made, the trial court must determine whether there was an improper comment on the defendant's exercise of his right

> to remain silent. If the Court finds that there was not, the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.

363 So.2d at 335.

This is a correct statement of the law as far as it goes, but it does not tell us what happens if the defendant's objection is overruled and he does not ask for a mistrial. The reason for requiring the defendant to contemporaneously ask for a mistrial when his objection has been sustained does not exist when his objection has been overruled. In overruling his objection, the trial court determines that there was not an improper comment on the defendant's exercise of his right to remain silent. Having made that determination, there would be no basis for the trial court to grant a mistrial even if the defendant were to ask for one. At that point, the

trial court has already overruled the defendant's contemporaneous objection. In that situation, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.

In the present case, the defendant's timely objections to the improper comments were overruled. For the reasons stated above, it was not necessary that he also move for mistrial. His objections were preserved, and since the improper comments constitute reversible error, he is entitled to a new trial.

As the appellee's second basis, that appellant did not litigate the precise ground argued here in support of his objection at trial, we find no support for this position in the record. Defense counsel adequately set forth at trial the grounds argued herein.

We hold that where a timely objection is made to an improper comment concerning defendant's right to remain silent, and the objection is overruled, thus rendering futile a motion for mistrial, the issue of the admission of such comment is properly preserved for appeal.

The decision of the circuit court is reversed and remanded for the purpose of granting a new trial.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ALDERMAN and MCDONALD, JJ., Concur NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An appeal from the Circuit Court in and for Duval County,

William Lamar Rose, Judge (Retired) - Case Nos. (Duval) 76-386 CF and (Palm Beach) 75-2553 CF

Richard L. Jorandby, Public Defender; and Craig S. Barnard, Chief Assistant Public Defender and Jerry L. Schwarz, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida

for Appellant

Jim Smith, Attorney General and Miguel A. Olivella, Assistant Attorney General, Tallahassee, Florida

for Appellee

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SUPREME COURT, U.S.

NO. 82-833

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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STATE OF FLORIDA,

Petitioner,

vs.

WILLIE CLAYTON SIMPSON,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

# RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel For Respondent

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No. 82-833

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF FLORIDA,

Petitioner,

-vs.-

WILLIE CLAYTON SIMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Willie Clayton Simpson, respectfully opposes the petition for a writ of certiorari filed on November 12, 1982 by petitioner, State of Florida, seeking review of the decision of the Supreme Court of Florida in this case. This brief in opposition is being filed as provided by Rule 22.1 of the Rules of this Court.

## CITATION TO OPINION BELOW

The opinion of the lower court in this case is reported as Simpson v. State, 418 So.2d 984 (Fla. 1982).

## STATEMENT OF THE CASE

The pertinent facts of this case are set forth in the opinion of the Supreme Court of Florida appended to the petition for a writ of certiorari (4a, 8a-10a).

Further, respondent specifically and catagorically

denies, as being untrue, argumentative and unsupported by the record the petitioner's assertion that "while he was incarcerated awaiting trial for that murder, be formulated a plan by which he could obtain immunity for the first murder." (Pet. at 6). Respondent likewise denies the characterizations by petitioner arising from the above statement. Respondent also denies petitioner's claim that respondent "had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted." (Pet. at 10).

As to petitioner's argument in its "Statement of Facts" that this Court should consider extrarecord materials, it is submitted that this Court should reject petitioner's belated efforts as did the Supreme Court of Florida. Regardless, as discussed infra, petitioner's efforts are based upon a misperception of the issue involved, and for that reason should be disregarded.

Respondent adds the following facts to petitioner's Statement of the Facts: Respondent was a suspect in this case during the time the police officers spoke with him (at least as early as January, 1975) (e.g. Trial Trans. 102-103); respondent was given "Miranda warnings" on at least three occasions when the officers spoke with him about this case; respondent was represented by counsel; immediately after the prosecutor's discussion in the trial concerning respondent's refusal to testify because of an alleged desire for immunity (Trial Trans. 603-604), the prosecutor discussed a co-defendant's testimony before the grand jury and whether he had been granted immunity (Trial Trans. 604-605) and there were numerous other references during the

trial to the grand jury investigating the instant case (Trial Trans. 10, 15, 61, 309, 372, 395, 406-407, 412, 658); respondent did not testify at any preliminary proceeding in this case, including the grand jury.

## REASONS THAT THE WRIT SHOULD BE DENIED

The lengthy and elaborate certiorari petition in this case misconstrues the issue involved in its attempt to create a colorable federal question. Contrary to its position in the lower court, petitioner now characterizes the question as one involving post-arrest/pre-arrest silence and attempts to rely upon Jenkins v. Anderson, 447 U.S. 231 (1980) for the proposition that pre-arrest silence may be used to impeach a defendant.

However, the issue in this case is not one involving simple pre-arrest silence. The present case involves refusal to testify in a court proceeding concerning this case.[1/] The

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1/ Accordingly, the Florida Supreme Court's decisions regarding post-arrest silence that are relied upon by petitioner, are not apposite to the present case involving reference to respondent's refusal to testify at a preliminary proceeding. Those decisions -- Bennett v. State, 316 So.2d 41 (Fla. 1975) and Jones v. State, 200 So.2d 274 (Fla. 3d DCA 1967) -- concern a different situation than that of the present case, and were correctly decided, as petitioner concedes. (Pet. at 17). As will be discussed herein, the issue regarding reference to refusal to testify is plainly state-law based. And although not involved in the instant case, it can be noted that the Florida courts' position with regard to post-arrest silence is likewise state-law based: "as a matter of state constitutional law, it is impermissible to comment on a defendant's post-arrest silence whether or not the silence is induced by Miranda warnings." Lee v. State, ___So.2d___, 1982 F.L.W. 2311 (Fla. 3d DCA November 2, 1982). This position is based upon state law and policy, e.g. Webb v. State, 347 So.2d 1054, 56 (Fla. 4th DCA 1977), as expressly authorized by this Court in Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490, 494 (1982). See also Jones v. State, supra, 200 So.2d at 577 (where the court states that its holding is based upon "the administration of justice"). Nevertheless, the instant case involves the refusal to testify, not post-arrest silence, and is expressly state-law based.

refusal to testify has been plainly differentiated from silence at arrest by the Florida Courts. The ruling below is solidly based upon an interpretation of a 75 year old state statute (now criminal rule) and an almost 50 year old precedent interpreting that statute. This state law precedent well preceded Miranda v. Arizona, 384 U.S. 436 (1966), and Doyle v. Ohio, 426 U.S. 610 (1976) that petitioner now claims are the bases for the Florida Supreme Court's decision in the instant case. To the extent that Miranda and Doyle have been cited in more recent opinions, they have been examined for "general policy" expressions, not for federal constitutional precedent relating to the comment on refusal of a defendant to testify. The failing of petitioner's current arguments is its confusion of pre-arrest-silence "apples" with refusal-to-testify "oranges".

The state statute in question is one that expressly prohibits comment on a defendant's failure to testify. The question in interpreting that state statute when it was enacted decades ago was whether its prohibition on comment on failure to testify extended beyond failure to testify at trial in also prohibiting comment on failure of a defendant to testify at pre-trial proceedings. The Supreme Court of Florida in 1939 held that the statutory prohibition extended to comment on a defendant's failure to testify at preliminary proceedings. In Simmons v. State, 139 Fla. 645, 190 So. 756 (1939) the Florida Supreme Court interpreted the 1927 law:

> "This statute applies to comment on the failure of the accused to testify at a preliminary hearing, an application for bail, a habeas corpus hearing or a former trial, as well as his failure to testify in the present trial."

(Emphasis supplied) 190 So. at 757. The Court further explained that allowing comment on failure to testify at a preliminary proceeding "deprives the defendant of the protection the statute was intended to secure ..." (Emphasis supplied) Id. See also Trafficante v. State, 92 So.2d 811 (Fla. 1957) ["This statute has been on the books for many years, and this court is firmly committed to the rule that a violation of it cannot be cured by our harmless error statute." (emphasis supplied)].

The decision in Simmons was based solely and squarely upon an interpretation and application of the state statute. And it was upon Simmons that the Florida Supreme Court based its holding in Willinsky v. State, 360 So.2d 760 (Fla. 1978). The holding in Willinsky was that Fla.R.Crim.P. 3.250,[2/] the successor to the statute reviewed in Simmons, prohibited disclosure of an accused's failure to testify at

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2/ Rule 3.250, Florida Rules of Criminal Procedure, provides as follows:

> "In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf except his own, shall be entitled to the concluding argument before the jury.

a preliminary hearing. The holding in Willinsky was based squarely upon Simmons, the state statute and state policy grounds:

> In our opinion, the rule in Simmons v. State, supra, was correct. The reinstatement of this rule has in its favor the simplicity of operation and serves as an additional inducement to prosecutors and law enforcement officers when giving testimony to follow the dictates of Simmons, supra, by taking from them all hope that any useful advantage would be gained by intimating that defendant exercised his right to remain silent during any preliminary stage of the proceedings.

(Emphasis supplied). 360 So.2d at 763. The Florida Supreme Court in Willinsky did refer to this Court's decision in Doyle v. Ohio, supra and United States v. Hale, 422 U.S. 171 (1975). The Court expressly recognized the difference between the "silence at arrest" questions reviewed in those decisions and the refusal to testify situation at issue in Willinsky and herein. The Florida Supreme Court thus referred only to the "language" in those cases as "reflect[ing] general policy." 360 So.2d at 762. The decision in Willinsky was not based upon an application of the Fifth Amendment as petitioner now claims,[3/]

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3/ Petitioner claims in its attack on the Florida Supreme Court rulings that the court "inexplicably refused to recognize that Doyle was decided upon due process grounds" not on the Fifth Amendment (Pet. at 16, n.2). Petitioner is flatly wrong as shown by the quote from Willinsky v. State, supra in the opinion below (7a) where the court expressly states its understanding that Doyle was grounded on due process. Petitioner is lifting a phrase out of context in order to invent a federal issue. The reference in the opinion below to the Florida Supreme Court's position "with respect to the Fifth Amendment" (5a) uses the words "Fifth Amendment"

but was grounded solidly upon state policy and state statutory law. And it is upon Willinsky that the decision below is based.[4/]

Accordingly, the present case involves a question of application of state law with decades of state decisional precedent. The Florida courts are applying Florida law consistently with Florida practice and procedure. The Florida court below thus did exactly what this Court has expressly authorized it to do:

> "Our decision today does not force any state court to allow impeachment through the use of pre-arrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."

Jenkins v. Anderson, 447 U.S. 231, 240 (1980). Accord Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490, 494 (1982).

Therefore, the present case is not proper for the exercise of this Court's certiorari jurisdiction as no federal question is presented.

• • •

The fact that the opinion of the Florida Supreme Court below does not fully detail the state law bases for its ruling

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Footnote 3/ continued:

"as a generic and commonly used reference to the right [to remain silent] as found in both the State and Federal Constitutions." Lee v. State, supra, n.3. The reference to the Fifth Amendment thus relates to whether the right against self-incrimination is applicable, but the determination of whether to allow comment on the exercise of that right is based upon state law grounds.

4/ The decision below is plainly based upon Willinsky as it involves the same situation as involved in the present case. The references to Bennett v. State, supra and Jones v. State, supra, are simply statements of policy that the Florida courts do not apply harmless error reasoning to such errors. See also footnote 1, supra.

except by citation to its prior decisions, is because the issue was not raised by petitioner inthe Florida Supreme Court. Petitioner conceded the error in its brief before the Florida Supreme Court and put forth only two arguments in its brief in the court below: (1) that the issue had not been properly preserved for appeal under state procedural rules; and (2) that even were it properly preserved for review, the Florida Supreme Court should re-examine its prior decisions holding that such error would not be held to be harmless. The petitioner thus did not raise the issue in its brief that it seeks to raise in this Court.[5/] Therefore the Florida Supreme Court's opinion addresses only the two issues set out above. It was only after the Florida Supreme Court decided against it on those issues that petitioner tried to create a new question.[6/] The petitioner tries to take advantage of a situation of its own making

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5/ Thus, petitioner's argument that "there was no mention of the Florida Constitution or of any Florida evidentiary rule" in the lower court's opinion (Pet. at 23) is particularly misplaced and to no avail. The lower court addressed precisely the issues raised by petitioner and petitioner now cannot be heard to find fault in the court's failure to fully detail a question it did not raise and in fact conceded. The fact is that the lower court did rely upon its previous decision in Willinsky v. State, supra, which did show the state law basis for its ruling.

6/ Petitioner raised no argument regarding the substance of the question until its motion for rehearing (and even then treated it incorrectly as involving pre-arrest silence rather than reference to the refusal or failure to testify). It was also on rehearing that petitioner sought to have the Florida Supreme Court consider extrarecord materials. The Florida Supreme Court rejected those efforts and denied rehearing. Although the opinion was modified, it was modified on the basis of a special, separate motion filed by the original prosecutor in the case who is now a state circuit judge asking for personal reasons that some critical language relating to

by lifting bits and pieces from the Florida Supreme Court's opinion out of context and then trying to create a false and incomplete trial of Florida precedent in order to invent a federal question where there clearly is none. Such a disingenuous switch of positions should not be countenanced and should be rejected by this Court as it was by the Florida Supreme Court. Likewise, this Court should rebuff the efforts by petitioner to have this Court consider materials not contained in the appellate record below as did the Florida Supreme Court.[7]

• • •

Petitioner's second contention, that this Court

Footnote 6/continued:

the prosecutor as being "overzealous" be omitted from the published opinion -- no other modifications were made in the opinion. Accordingly, the Florida Supreme Court flatly rejected petitioner's efforts to inject some new issue into the case and to have it consider extrarecord materials. This Court should likewise reject those efforts.

7/ Further, in this regard, the state's efforts through the extrarecord material to show that the comment actually referred to respondent's refusal to testify in a preliminary hearing investigating this case rather than the grand jury investigating this case, lends no support to its argument. First, as previously discussed, the state statutory provision prohibits reference to refusal to testify at any preliminary proceeding. Second, as found by the lower court, the examination and argument of the prosecutor taken in context is readily susceptable to an interpretation referring to respondent's refusal to testify before the grand jury -- and this is the standard for judging comments under the state statutory prohibition. See, e.g. Trafficante v. State, 92 So.2d 811, 814 (Fla. 1957) [such comment is reversible error "if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction." (emphasis supplied). Lastly, the facts remain -- regardless of whether the references involved the preliminary hearing or the grand jury -- that the comments concerned respondent's refusal to testify at a time when he was a primary suspect in the case, had at least three times been given Miranda warnings regarding this case, was in custody and was acting under the advice of counsel.

should exercise its certiorari jurisdiction to overrule Florida's application of its own harmless error rule, patently raises no federal question. Florida's refusal to apply a harmless doctrine is based upon a state policy determination with lengthy precedent. As petitioner notes, Florida courts have decided that a harmless error rule should not be applied in Florida in errors of this type as a "prohylactic rule" as "an additional inducement to prosecutors" to avoid such error "by taking from them all hope that any useful advantage would be gained" by referring to a defendant's silence at a preliminary proceeding. Willinsky v. State, 360 So.2d 760, 763 (Fla. 1978). This likewise had been the ruling in 1939 in Simmons v. State, supra where the Florida Supreme Court was interpreting its state statute. See also Trafficante v. State, 92 So.2d 811 (Fla. 1957). The application or nonapplication of a harmless error rule is a matter exclusively within the provence of the state courts. Contrary to petitioner's assertions, the case of United States v. Hastings, 660 F.2d 301 (7th Cir. 1981), cert.gtd, ___U.S.___, 102 S.Ct. 2232, 72 L.Ed.2d 844 (1982), does not involve any issue relevant to the present case. The Hastings case concerns federal courts and federal practice and procedure and an interpretation of 28 U.S.C. §2111 and Fed.R.Crim.P. 52(a). The Florida practice regarding harmless error is not based upon a federal constitutional ground but rather upon state law and practice. For that reason no federal question is presented.

• • •

In summary, the present case is not appropriate for

the exercise of this Court's certiorari jurisdiction as it presents no federal question. Petitioner has misconstrued the issue that was involved in this case in an attempt to create a federal question and in its attempt it asks this Court to parse and reparse a record already reviewed by unanimous Florida Supreme Court and impermissibly asks this Court to consider issues that it did not properly raise below and to consider extrarecord materials. There is no basis for invoking the certiorari jurisdiction of this Court.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent

NO. 82-833

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE CLAYTON SIMPSON,

Respondent.

CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of Respondent's Brief in Opposition, Motion for Leave to Proceed In Forma Pauperis and the Affidavit in the above case on counsel for petitioner by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Hon. Raymond L. Marky
Assistant Attorney General
Department of Legal Affairs
The Capitol, 1502
Tallahassee, Florida 32301

All parties required to be served have been served. Done this 16th day of DECEMBER, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

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STATE OF FLORIDA,

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Respondent.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, WILLIE CLAYTON SIMPSON, who is now imprisoned, asks for leave to file the accompanying Brief in Opposition to Petition for a Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Respondent sought and was granted leave to proceed in forma pauperis in the Supreme Court of Florida below. Respondent has attached hereto his affidavit in substantially the form prescribed by Fed.R.App.P., Form 4.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent

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STATE OF FLORIDA,

Petitioner,

-v-

WILLIE CLAYTON SIMPSON,

Respondent.

---

# A F F I D A V I T

I, WILLIE CLAYTON SIMPSON, being first duly sworn according to law, depose and say, in support of my motion to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death in the Circuit Court of Duval County, Florida. I appealed the conviction and sentence to the Supreme Court of Florida. That Court vacated my conviction and ordered a new trial. The petitioner, State of Florida, is now petitioning for a writ of certiorari in this Court.

I swear that the above is true and correct.

Willie Clayton Simpson
WILLIE CLAYTON SIMPSON

N P SEAL

Sworn to and subscribed
before me this 1 day
of Dec., 1982.

Notary Public

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT 30 1985
BONDED THRU GENERAL INS. UNDERWRITERS

NO. 82-833

RECEIVED
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STATE OF FLORIDA,

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Respondent.

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# A F F I D A V I T

This is to certify that I, Craig S. Barnard, a member of the Bar of this Court, deposited Respondents Brief in Opposition in the above-styled cause, in the United States mail, first class postage prepard, at the Main Branch of the United States Postal Service Office, on December 16, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender

COUNSEL FOR RESPONDENT

STATE OF FLORIDA )
SS:
COUNTY OF PALM BEACH )

SWORN TO AND SUBSCRIBED before me on this 16th day of DECEMBER, 1982.

Sali W. Johnson
Notary Public
State of Florida At Large

My Commission Expires: Notary Public, State of Florida at Large My Commission Expires May 8, 1983

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CASE NO. 82-833

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

# REPLY BRIEF OF PETITIONER

---

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General
(Counsel of Record)

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600

## QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONCLUDED THAT THE RIGHT AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS APPLIED TO A DEFENDANT WHO WAS CROSS-EXAMINED AT TRIAL ABOUT HIS SILENCE AT A PRIOR PRELIMINARY HEARING FOR ANOTHER INDIVIDUAL AT A TIME WHEN THE DEFENDANT HAD NOT BEEN ARRESTED, HAD NOT RECEIVED MIRANDA WARNINGS, AND WAS NOT EVEN A SUSPECT?

II.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY REFUSED TO APPLY THE HARMLESS ERROR DOCTRINE TO DETERMINE WHETHER ALLEGEDLY IMPROPER COMMENTS AND TESTIMONY ABOUT A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT CONSTITUTED REVERSIBLE ERROR?

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IN THE
SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

# REPLY BRIEF OF PETITIONER

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## REASONS WHY THE WRIT SHOULD BE GRANTED

Respondent has asserted that Florida is now arguing an inconsistent position from that advanced in the Florida Supreme Court. This is untrue -- the state argued in its Motion for Rehearing the identical theories raised in the Petition for Writ of

Certiorari. If any party is advancing an inconsistent position it is Respondent who argued in the Florida Supreme Court that the prosecution impermissibly commented on Respondent's failure to testify before the grand jury. For example, Respondent's argument heading was:

> THE PROSECUTOR COMMITTED HARMFUL CONSTITUTIONAL ERROR BY ELICITING FROM APPELLANT DURING CROSS-EXAMINATION AND IN COMMENTING ON DURING CLOSING ARGUMENT, OVER DEFENSE OBJECTIONS, APPELLANT'S FAILURE TO TESTIFY BEFORE THE GRAND JURY. (Emphasis added).

(Brief of Appellant in Florida Supreme Court at 13). Respondent specifically argued that: "The intent of the prosecutor was clear -- to infer Appellant's guilt because of his refusal to testify before the grand jury." (Brief of Appellant in Florida Supreme Court at 13, 14.) (Emphasis added.) Respondent continued: "likewise in the instant case the

prosecutor on cross-examination elicited from Appellant his refusal to testify before the grand jury." (Brief of Appellant in Florida Supreme Court at 14.) (Emphasis added).

Now, however, Respondent has informed this Court that "respondent did not testify at any preliminary proceeding in this case, including the grand jury." (Respondent's Brief in Opposition at 3.) Who is being inconsistent?

Moreover, Respondent has urged this Court not to consider "extrarecord materials" although Respondent referred to the fact that the prosecutor (now a circuit judge) had asked "for personal reasons" that the opinion be modified. However, Respondent has not informed the Court that the "personal reasons" were found in a motion in which he stated that the Florida Supreme Court had accused him of being

"overzealous" and that that characterization was unfair because he had not referred to the grand jury. Rather, he informed the state court that Respondent had been cross-examined about his refusal to testify at another defendant's preliminary hearing which was held only because Respondent had falsely accused that defendant in an unsuccessful attempt to obtain immunity:

> 5. As an officer of this Honorable Court, it is my good faith belief the trial transcript will reflect that I did not cross-examine the defendant, Willie Clayton Simpson, about "his failure to testify before the grand jury investigating this crime", nor make reference thereto in closing argument. See pages 601-603 and page 663 of the trial transcript. In fact, Mr. Simpson never appeared before the grand jury. I did, however, cross-examine the defendant about his refusal to testify against Jimmy Lee Harold, a person whom Mr. Simpson had falsely accused of murdering Officer John Kennedy of the Delray Beach Police Department. Based on the false accusation of Willie Clayton Simpson, a probable cause arrest was made by the Palm Beach County Sheriff's Department. When Mr.

> Harold appeared at his preliminary hearing on that arrest, Willie Clayton Simpson refused to testify against Mr. Harold unless he was given immunity rather than on Fifth Amendment grounds.
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> 6. As a lawyer and officer of this Court, it is my good faith belief that it is fairly debatable that when Simpson refused to testify against Mr. Harold, he did so not because his testimony would incriminate himself, but rather because the State would not, in exchange therefor, grant him immunity in an unrelated first degree murder charge then pending against Simpson.

As a result of this motion, the language condemning the prosecutor's conduct was removed from the opinion by the Florida Supreme Court. Yet that Court refused to retreat from its reversal even though it had to know that the prosecutor had not referred to the grand jury and that Respondent had never been before a grand jury.

The State of Florida recognized that its allegations of fact would be difficult

to sustain without this Court's having the benefit of lengthy record excerpts. A motion to certify selected portions of the record to the Court was duly filed in the Supreme Court of Florida, but that motion was denied based upon the Court's previous instruction to the state court that if the Court needed a record, it would ask for it. Therefore, should there be any doubt about which party is accurate, the State of Florida respectfully submits that the Court should request the relevant materials filed in the Supreme Court of Florida. As it stands now, Respondent has "clouded" the status of the record and has distorted in this Court, as was done in the Florida Supreme Court, what actually occurred at trial.

Again, the State of Florida categorically asserts that Respondent was <u>never called</u> to testify at a grand jury investigating this crime. Therefore, the

prosecutor's question about Respondent's refusal to testify at someone else's preliminary hearing which occurred nine months before Respondent was arrested for this crime was proper impeachment -- and any holding to the contrary flies in the face of Jenkins v. Anderson, 447 U.S. 231 (1980), and Fletcher v. Weir, ___ U.S. ___, 71 L.Ed.2d 490 (1982), which clearly hold to the contrary.

Respondent's predictable assertion that the case does not present a substantial federal question can be refuted by a reading of the cases relied upon in the state court opinion. Also, even more persuasive is the fact that on the face of the opinion upon which review is sought, the state court explicitly refers to its position on the "Fifth Amendment right to silence...." Simpson v. State, 418 So.2d 984 (Fla. 1982).

Petitioner cannot comprehend Respondent's attempt to persuade the Court that the Florida Supreme Court based its decision on precedent interpreting "a 75 year old state statute...." (Respondent's Brief in Opposition at 5.) There is absolutely no mention or reliance upon either a statute or procedural rule in this case. See Anderson v. Harless, ___ U.S. ___, 32 Cr.L. 4063 (1982); Oregon v. Hass, 420 U.S. 714 (1975). Moreover, the Florida Supreme Court indisputably cited Miranda v. Arizonza, 384 U.S. 436 (1966), and Doyle v. Ohio, 426 U.S. 610 (1976), and United States v. Hale, 422 U.S. 171 (1975), in its opinion in this case. Respondent's contention that the state court's decision was based on state law rather than federal law is spurious and merely an attempt to cloud the record to prevent a grant of certiorari.

Similarly, Respondent has argued that state law was the predicate for the Florida Supreme Court's refusal to apply the harmless error doctrine. Respondent has apparently forgotten that he argued in the Supreme Court of Florida that the error was of "constitutional dimensions" and that he specifically referred the state court to Doyle v. Ohio, supra. See Brief of Appellant in Florida Supreme Court at 15. Also, Respondent argued that such error "can never be harmless" -- an issue which will be decided this term in United States v. Hastings, Case No. 81-1463.

Moreover, both in the State's Answer Brief and the Motion for Rehearing, the State argued that if there had been error, under federal constitutional law it had to be harmless. In fact, both Doyle, supra, and Chapman v. California, 386 U.S. 18 (1967) were relied upon in the Answer Brief

at 22. Also, in the Motion for Rehearing, the State specifically urged that since the right "springs from Miranda, there is no rational reason why federal standards should not be followed...." State's Motion for Rehearing at 9. Finally, in Appellant's Reply Brief in the state court, absolutely no mention was made of the fact that state law, rather than federal law, prevented the application of the harmless error doctrine. In fact, no mention was made at all of the State's harmless error argument.

Therefore, since only harmless error under the federal Constitution was raised, and because the Florida Supreme Court chose not to discuss the issue at all, the state court decision must rest upon interpretation of federal law. Since this precise issue is currently before the Court in United States v. Hastings, review should be granted and the case stayed pending disposition of that case.

## CONCLUSION

This case should be summarily vacated in light of Jenkins v. Anderson, supra, or in the alternative, the case should be held pending disposition of United States v. Hastings, supra.

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General
(Counsel of Record)

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600